

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHIPCENTRAL REALTY, INC.	:	DECISION
	:	DTA No. 806626
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Fiscal Year Ending November 30, 1986.	:	

Petitioner Shipcentral Realty, Inc., 41 East 42nd Street, Suite 1607, New York, New York 10017 filed an exception to the determination of the Administrative Law Judge issued on August 8, 1991 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ending November 30, 1986. Petitioner appeared by Curtis, Mallet-Prevost, Colt & Mosle (William L. Bricker, Jr., Esq. and D. Jeffrey Disbrow, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals in this matter and the responses of the parties to the Tax Appeals Tribunal's Notice of Intent to Dismiss Exception, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed its exception to the determination of the Administrative Law Judge.

FINDINGS OF FACT

We find the following facts.

The determination of the Administrative Law Judge was mailed by certified mail to petitioner on August 8, 1991, at petitioner's last known address at 41 East 42nd Street, Suite 1607, New York, New York 10017.

Petitioner's exception to the determination of the Administrative Law Judge was required to be filed by September 9, 1991. Petitioner's request for an extension of time to file an exception was received by the Office of the Secretary to the Tax Appeals Tribunal on September 12, 1991. The envelope containing the request for an extension of time to file an exception had a United States Postal Service postmark of September 10, 1991 and an office metered postmark of September 9, 1991.

By letter dated September 23, 1991, the Secretary to the Tribunal informed petitioner that its request for an extension of time to file an exception appeared to be untimely. Petitioner was given until October 23, 1991 to submit any documentation which would prove the request was timely filed.

Petitioner then filed an exception on October 23, 1991. The covering letter to the exception stated that the envelope containing the extension request bore an office metered stamp of September 9, 1991 which meant that it was delivered to the United States Post Office that same day.

On November 22, 1991, the Tribunal issued a Notice of Intent to Dismiss Exception on the ground that it was not timely filed. The parties were given until December 23, 1991 to respond to the Notice. A response to the Notice was filed by the Division of Taxation which stated that the Division of Taxation did not oppose the Notice. Petitioner submitted a letter and affidavits in opposition to the Notice.

By letter dated February 4, 1992, the Secretary to the Tribunal granted petitioner additional time to respond to the Notice because of a misunderstanding on certain matters of proof. Petitioner responded to this letter with a letter dated March 10, 1992 again submitting that the extension request was timely filed.

OPINION

Subdivision 7 of section 2006 of the Tax Law provides that the Tribunal shall have the following functions, powers and duties:

"To provide for a review of the determination of an administrative [sic] law judge, if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination" (Tax Law § 2006[7]).

20 NYCRR 3000.11(a)(1) provides as follows:

"Within 30 days after the giving of notice of the determination of the administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception with the secretary A copy of the exception shall be served at the same time on the other party. When the division of taxation is the other party, service shall be made on the director of the Law Bureau" (20 NYCRR 3000.11[a][1]).

Exceptions must be filed within 30 days after the giving of notice of the determination of the Administrative Law Judge (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][1]). The Tribunal may grant an extension of time to file an exception if the request is made within the 30-day period (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][2]). An exception or request for an extension of time to file an exception received by this Tribunal, after the date it was due, is deemed to be filed on the date of the United States postmark stamped on the envelope (20 NYCRR 3000.16). The exception in this matter was required to be filed by September 9, 1991. The request for an extension was received by the Office of the Secretary to the Tribunal on September 12, 1991 which is not within the 30-day period for filing an exception. The envelope containing the exception bore a United States postmark of September 10, 1991 which is also not within the 30-day period for filing an exception. The envelope also contained an office metered postmark of September 9, 1991 which is within the 30-day period for filing an exception. However, when an envelope contains both a United States Postal Service postmark and an office metered mail postmark, the postmark not made by the United States Postal Service will be disregarded (20 NYCRR 3000.16[b][3]).

Petitioner has submitted affidavits by its representative and two of its representative's employees in an attempt to prove that the extension request was delivered to the United States Postal Service on September 9, 1991.¹

In the absence of a timely postmark, we must reject petitioner's affidavits as proof of timely filing of the request. "The scheme of the statutes and implementing regulations is designed to avoid testimony as to date of mailing in favor of tangible evidence in the form of an official government notation" (Shipley v. Commissioner, 572 F2d 212, 78-1 USTC ¶ 9211). When a legible postmark appears on an envelope, no evidence that the petition was mailed on some other day will be allowed; the untimely postmark is the controlling factor (see, Shipley v. Commissioner, supra). The rules of the Tribunal specifically state that if the postmark stamped by the United States Postal Service does not bear a date within the prescribed filing period, the document will not be considered timely filed regardless of when the envelope was deposited in the mail (20 NYCRR 3000.16[2][iii]).

We further reject petitioner's argument that the request was timely filed because the Division of Taxation, which is located in Albany, received a copy of the request on September 11, 1991 and, therefore, the request must have been mailed from Manhattan on or before September 9, 1991. The request had to be filed with the Tax Appeals Tribunal (Division of Tax Appeals) (20 NYCRR 3000.16[a]) located in Troy on or before September 9, 1991, and the date the request was received by the Division of Taxation in Albany is irrelevant to the question of timely filing with the Tax Appeals Tribunal.

¹We note that the affidavits of petitioner's representative and the representative's secretary indicate that the request for an extension of time to file an exception was delivered to the representative's mail department on September 6, 1991 for delivery that same day to the United States Postal Service. However, we also note that the affidavit by an employee of the representative's mail department indicates that the request for an extension was hand delivered to the United States Postal Service on September 9, 1991.

Petitioner further argues that the the Administrative Law Judge's determination was not mailed on August 8, 1991. In support of this argument, petitioner maintains that the Division of Taxation did not receive the Administrative Law Judge's determination until August 14, 1991, six days after it was mailed. It seems that petitioner is inferring that it would not have taken this amount of time for the determination to reach the Division of Taxation in Albany; therefore, it must have been mailed later than August 8, 1991. Petitioner is relying on a letter from the Division of Taxation's representative which states "[t]he Determination of Administrative Law Judge Catherine M. Bennett was issued on August 8, 1991, and received by the Division [of Taxation] on August 14, 1991." We have no knowledge of the Division of Taxation's office practice with regard to incoming mail. In any event, we do not see the relevancy of this argument. A petitioner has 30 days from the giving of notice of a determination of an Administrative Law Judge to file an exception. The giving of notice commences when the determination is mailed by the Division of Tax Appeals (Tax Law § 2006[7]; 20 NYCRR 3000.17[a]).

Petitioner's next argument is that the Division of Tax Appeals' mailing evidence in this matter fails to comply with the requirements set forth in Matter of Katz (Tax Appeals Tribunal, November 14, 1991). We reject this argument because the facts in this matter and those of Katz are clearly distinguishable. In Katz, there was no postmark on the relevant page of the mailing record.

In the instant matter, the Division of Tax Appeals' affidavit of mailing and certified mail record together establish that the Division of Tax Appeals mailed the Administrative Law Judge's determination on August 8, 1991. The affidavit of mailing in this matter sets forth the mailing procedures of the Division of Tax Appeals and indicates that the Administrative Law Judge's determination was mailed by certified mail to petitioner on August 8, 1991. The certified mail record, PS Form 3877, indicates acceptance by the United States Post Office of certified mail containing petitioner's name and address on August 8, 1991.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioner Shipcentral Realty, Inc. is hereby dismissed with prejudice as of this date.

DATED: Troy, New York
May 21, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner